UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Jeanmax Darbouze

v. Civil No. 10-cv-252-LM

Nicholas A. Toumpas, Commissioner, New Hampshire Department of Health and Human Services, individually and officially; David Ball, Chief of Operations, individually and officially; and Margaret LaFleur, individually and officially

O R D E R

Jeanmax Darbouze, a former employee of the New Hampshire Department of Health and Human Services ("DHHS") has sued in fourteen counts, for damages and injunctive relief. Darbouze's claims are based on the termination of his employment as a part-time Youth Counselor I at the Sununu Youth Services Center ("SYSC") in February of 2008, and DHHS's failure to hire him when he applied for five other positions in March, April, and May of that year. Those claims arise under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000-e to 2000e-17, the Federal Constitution (by means of 42 U.S.C. § 1883), the New Hampshire Constitution, and state common law. Before the court is defendants' motion for summary judgment on all fourteen counts of Darbouze's First Amended Complaint

(hereinafter "FAC" or "complaint"). Darbouze objects. For the reasons that follow, defendants' motion for summary judgment is granted.

Summary Judgment Standard

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). "An issue is genuine if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Chadwick v. WellPoint, Inc., 561 F.3d 38, 43 (1st Cir. 2009) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). "The object of summary judgment is to 'pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required.'" Dávila v. Corporación de P.R. para la Diffusión Pública, 498 F.3d 9, 12 (1st Cir. 2007) (quoting Acosta v. Ames Dep't Stores, Inc., 386 F.3d 5, 7 (1st Cir. 2004)). "[T]he court's task is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009) (citations and internal quotation marks omitted).

"Once the moving party avers an absence of evidence to support the non-moving party's case, the non-moving party must offer 'definite, competent evidence to rebut the motion,'" Meuser v. Fed. Express Corp., 564 F.3d 507, 515 (1st Cir. 2009) (citing Mesnick v. Gen. Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991)), and "cannot rest on 'conclusory allegations, improbable inferences, [or] unsupported speculation,'" Meuser, 564 F.3d at 515 (quoting Welch v. Ciampa, 542 F.3d 927, 935 (1st Cir. 2008)). When ruling on a party's motion for summary judgment, a trial court "construe[s] the record in the light most favorable to the nonmovant and resolv[es] all reasonable inferences in [that] party's favor." Meuser, 564 F.3d at 515 (citing Rochester Ford Sales, Inc. v. Ford Motor Co., 287 F.3d 32, 38 (1st Cir. 2002)).

Background

In compliance with Local Rule ("LR") 7.2(b)(1), defendants' memorandum of law in support of their motion for summary judgment "incorporate[s] a short and concise statement of material facts, supported by appropriate record citations, as to which [defendants] contend[ ] there is no genuine issue to be tried." Darbouze's memorandum in opposition, however, includes a factual narrative, but does not "incorporate a short and concise statement of material facts, supported by appropriate

record citations, as to which [Darbouze] contends a genuine dispute exists so as to require trial." LR 7.2(b)(2). Accordingly, "[a]ll properly supported material facts set forth in [defendants'] factual statement shall be deemed admitted."[1] Id.; see also CMI Capital Mkt. Inv., LLC v. González-Toro, 520 F.3d 58, 62-63 (1st Cir. 2008) (affirming trial court's application of Puerto Rico's anti-ferret rule); Mariani-Colón v. Dep't of Homeland Sec. ex rel. Chertoff, 511 F.3d 216, 219 (1st Cir. 2007) (same); Ayala-Gerena v. Bristol Myers-Squibb Co., 95 F.3d 86, 95 (1st Cir. 1996) (noting, with approval, trial court's application of Massachusetts' anti-ferret rule). That said, the following description of the factual background of this case includes facts drawn from defendants' memorandum of law that have been deemed admitted, supplemented by other undisputed facts from the summary judgment record. See Fed. R. Civ. P. 56(c)(3).

Darbouze is a Haitian-born American citizen, and is black. In support of his motion for summary judgment, he submitted an undated resume that lists work as a private investigator (1997-98), as a corrections officer (1999-2000), and as the general

[1] In his factual narrative, Darbouze does relate several facts that may conflict with defendants' version of the facts. He does not, however, directly identify any such evidentiary conflict and, perhaps more importantly, he does not rely on any such conflict in his substantive argument against summary judgment.

manager of Notre Dame Security & Investigations (1998-present). In addition, it lists a 2003 Bachelor's degree in criminal justice, and indicates that Darbouze was working toward a Master's degree in criminal psychology.

In November of 2006, Darbouze interviewed with David Ball for a position as a Youth Counselor at SYSC. At the time, Ball was a supervisor at SYSC. Ball recommended Darbouze's hiring, and Darbouze began work as a full-time Youth Counselor I at SYSC in February of 2007.[2] Several months into his employment, Darbouze asked to switch from full-time status to part-time status. To make that change, he resigned from his full-time position and was re-hired as a part-time Youth Counselor I. In a letter dated April 17, 2007, Darbouze wrote: "I would like to reside [sic] my full time position to part time as soon as possible." Defs.' Mot. Summ. J., Ex. A, Attach. 1 (doc. no. 17-3). As a part-time Youth Counselor I, Darbouze became part of a pool of employees who were called on to fill gaps in the coverage provided by full-time Youth Counselors. For the next

[2] At various points, Darbouze contends that he believed he was applying for a position as a Youth Counselor II, and was surprised to find that he had been hired as a Youth Counselor I, but the circumstances and terms of his initial hiring are not material to any legal issue in this case. See Vineberg v. Bissonnette, 548 F.3d 50, 56 (1st Cir. 2008) ("A fact is material only if it possesses the capacity to sway the outcome of the litigation under the applicable law.") (quoting Cadle Co. v. Hayes, 116 F.3d 957, 960 (1st Cir. 1997)) (internal quotation marks and brackets omitted).

two months, Darbouze worked approximately twenty hours per week at SYSC.

In June of 2007, Darbouze asked for time off to recover from a knee injury. Ball granted that request. Darbouze was cleared for work in August of 2007, and spoke to Ball about returning to work at that time. When Darbouze expressed disinterest in the various shifts that Ball offered him, Ball advised Darbouze to call back in September, to see about shifts that might become available then, when SCYC's part-time summer workers finished their employment. Darbouze and Ball spoke at the end of September but, again, Darbouze was not interested in working the shifts for which Ball needed coverage. The shifts Darbouze declined were weekend and evening shifts, which are the shifts for which Ball generally needed coverage from part-time employees such as Darbouze. See Pl.'s Obj. to Summ. J., Ex. C (doc. no. 26-2), at 18-19. Darbouze's last shift as a part-time Youth Counselor I was in June of 2007.

In February of 2008, Ball was asked by DHHS's Bureau of Human Resources ("BHR") to review the SYSC payroll list and remove the names of persons no longer working there. Ball removed several names from the list, including Darbouze's. He removed Darbouze's name because he had not heard from Darbouze since September of 2007. Several weeks later, without explaining why it was making the request, BHR asked Ball to

contact Darbouze to explain why he had been removed from the payroll list. Ball did so, by telephone, and told Darbouze that because he had not worked in months, he had voluntarily quit his position. In May of 2008, Ball sent Darbouze a formal letter of separation from DHHS, indicating that he had been discharged in February.

Between March 31 and May 16, 2008, Darbouze applied for five DHHS positions, representing himself as an internal candidate by virtue of his employment as a Youth Counselor I at SYSC.[3] Specifically, he applied for the following positions: (1) # 40105, Juvenile Probation and Parole Officer ("JPPO"), in the Keene District Office; (2) # 16975, JPPO, in the Manchester District Office; (3) # 41050, Fraud Investigator with the Division of Family Assistance ("DFA"), in the Manchester District Office; (4) # 12507, Family Services Specialist ("FSS") Trainee, in the Manchester District Office; and (5) # 12681, FSS Trainee, in the Concord District Office. For each of those five positions, Darbouze was: (1) treated as an internal candidate; (2) certified by BHR as meeting the minimum qualifications; and

[3] In each application, Darbouze represented that he had worked as a Youth Counselor I from January of 2007 through the date of the application and had worked forty hours per week, notwithstanding the fact that he worked forty hours per week only from February through mid April of 2007, worked twenty hours per week from mid April through early June, and worked no hours at all after the second week of June.

(3) given an interview, as required by state personnel rules. Darbouze was not selected for any of those positions.

Darbouze applied for position # 40105 (JPPO) on May 16, 2008, and was notified that he had not been selected by letter dated July 10. The candidate DHHS selected had previously worked for five months as a Youth Counselor II at SYSC and for approximately one year as a Youth Counselor III at the Tobey School. Darbouze had only four months of experience as a Youth Counselor I, two of them working part time.

Darbouze applied for position # 16975 (JPPO) on April 19, 2008, and was notified that he had not been selected by letter dated June 18. The candidate DHHS selected was then working part-time as a JPPO II, and had experience as a youth caseworker. Darbouze had no experience as a JPPO and no apparent experience as a youth caseworker.[4]

Darbouze applied for position # 41050 (DFA Fraud Investigator) on April 19, 2008, and was notified that he had not been selected by letter dated May 22. The candidate DHHS selected had eight years of experience as a Family Services

[4] Darbouze's application, but not his resume, indicate that he worked for about a year and a half as a "case work specialist" for "child family / services" in Miami, Florida, but the box on the application where Darbouze was asked to describe the duties he performed in that position is blank. See, e.g., Pl.'s Mot. Summ. J., Ex. A, Attach A-2 (doc. no. 17-4), at 4.

Specialist in DFA. Darbouze had no experience as an FSS or in any other position with DFA.

Darbouze applied for position # 12507 (FSS Trainee) on March 31, 2008, and was notified that he had not been selected by letter dated May 20, 2008. The candidate DHHS selected was then working as an FSS in a different district office and had prior experience working with the developmentally disabled, who are a part of the DFA clientele. Darbouze had no experience as an FSS working for DFA, and neither his resume nor his application indicate that he had any experience working with the developmentally disabled.

Darbouze applied for position # 12681 (FSS Trainee) on April 19, 2008, and was notified that he had not been selected by letter dated June 18. The candidate DHHS selected had prior work experience in clerical positions at the Tobey School (as a volunteer) and at the Division of Juvenile Justice Systems, and also had experience as a medical assistant, a job that involved patient contact.

In his complaint, Darbouze alleges that Ball and Margaret LaFleur made the decisions not to hire him for each of the five positions described above. However, it is deemed admitted that neither Ball nor LaFleur had any role in the hiring decisions

for any of those five positions.[5] LaFleur did interview Darbouze on two occasions, but not for any of the five positions at issue here.

Darbouze's complaint also alleges that "[o]n April 29, 2008, [he] reported violations of his civil rights to DHHS." First Am. Compl. ¶ 24. He makes no further allegations about the content of his report, or to whom at DHHS he directed it. The materials he has submitted on summary judgment are no more informative on this issue, and are limited to the following sentence from Darbouze's response to an interrogatory propounded by Ball: "I complained both internally and to the New Hampshire Commission for Human Rights about violations of my civil rights." Pl.'s Obj. to Summ. J., Ex. F (doc. no. 25-4), at 4. By letter dated May 30, 2008, the New Hampshire Commission for Human Rights ("HRC") notified the Commissioner of the New Hampshire Juvenile Justice System that Darbouze had filed a charge of discrimination against it.

Based on the foregoing, Darbouze sued Toumpas, Ball, and LaFleur. While the FAC is not as clear as it might be – several

[5] Even if that fact were not deemed admitted, Darbouze has produced nothing to create a triable issue. All he has is his own deposition testimony which amounts to nothing more than speculation that: (1) "[a]ll those [DHHS] supervisors, they work together with Dave Ball," Pl.'s Obj. to Summ. J., Ex. A (doc. no. 26), at 88; and (2) "they're connected to each other," id. at 89. See generally id. at 87-92. He does not explain how he is competent to provide evidence on the inner workings of DHHS.

counts do not identify the law on which they are based – it asserts eight federal claims and six claims under state law. Darbouze's federal claims include the following: (1) DHHS discharged him because of his national origin (Count I) and race (Count II), in violation of 42 U.S.C. § 2000e-2(a)(1); (2) DHHS failed to hire him because of his national origin (Count III) and race (Count IV), also in violation of 42 U.S.C. § 2000e-2(a)(1); (3) DHHS retaliated against him, in violation of 42 U.S.C. § 2000e-3(a), by failing to hire him because he complained internally about discrimination (Count V), and because he filed a formal charge of discrimination (Count VI); and (4) Ball and LaFleur deprived him of his right to equal protection under the Fourteenth Amendment to the United States Constitution by hiring non-Haitian Caucasian candidates to fill positions for which he had applied and was qualified (Counts VII and IX). Darbouze's state claims include the following: (1) Ball and LaFleur deprived him of his right to equal protection under the New Hampshire Constitution by hiring non-Haitian Caucasian candidates to fill positions for which he had applied and was qualified (Counts VIII and X); (2) Ball is directly liable, and Toumpas and DHHS are vicariously liable, for wrongful termination (Counts XI and XII); and (3) Ball is directly liable, and Toumpas and DHHS are vicariously liable, for defamation (Counts XIII and XIV).

Discussion

Defendants move for summary judgment on all fourteen counts of Darbouze's First Amended Complaint. Darbouze objects. The court considers each of Darbouze's causes of action in turn.

A. Counts I and II

In Counts I and II, Darbouze claims that Ball discharged him because of his national origin (Count I) and his race (Count II). Defendants move for summary judgment, arguing that Darbouze has failed to present sufficient evidence to establish that he was discharged for any reason other than the fact that he had not worked any shifts at SYSC during the eight months leading up to his discharge. Darbouze contends that he has produced both direct evidence of discrimination and evidence sufficient to show that defendants' proffered reason for his discharge is pretextual. The court does not agree.

1. Legal Principles

It is unlawful for an employer "to discharge any individual . . . because of such individual's race, color, . . . or national origin." 42 U.S.C. § 2000e-2(a)(1). A plaintiff may prove a Title VII claim, including a discriminatory-discharge claim, by producing direct evidence of discrimination, see Patten v. Wal-Mart Stores E., Inc., 300 F.3d 21, 25 (1st Cir. 2002), and "[i]t is generally to an employee's benefit to show

direct evidence of discrimination," Weston-Smith v. Cooley Dickinson Hosp., Inc., 282 F.3d 60, 64 (1st Cir. 2002). Direct evidence of discrimination, however, is uncommon. See Patten, 300 F.3d at 25; Weston-Smith, 282 F.3d at 65; Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 53 (1st Cir. 2000)). Accordingly, courts have fashioned a now-familiar framework for proving discrimination cases with circumstantial evidence. As the court of appeals for this circuit explained in a case involving an employee's claim that he was discharged because of his race:

> Disparate treatment cases "ordinarily proceed under the three-step, burden-shifting framework" outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Clifford v. Barnhart, 449 F.3d 276, 280 (1st Cir. 2006). First, the plaintiff must establish, by a preponderance of the evidence, a prima facie case of discrimination. See Kosereis v. Rhode Island, 331 F.3d 207, 212 (1st Cir. 2003). Second, if the plaintiff makes out this prima facie case, the defendant must articulate a legitimate, nondiscriminatory explanation for its actions. See id. Third, if the defendant carries this burden of production, the plaintiff must prove, by a preponderance, that the defendant's explanation is a pretext for unlawful discrimination. See id. The burden of persuasion remains at all times with the plaintiff. See Sher v. U.S. Dep't of Veterans Affairs, 488 F.3d 489, 507 (1st Cir. 2007).

Mariani-Colón, 511 F.3d at 221 (1st Cir. 2007) (parallel citations omitted); see also Benoit v. Tech'l Mfg. Corp., 331 F.3d 166, 173 (1st Cir. 2003).

2. Direct Evidence

Darbouze appears to contend that he has produced direct evidence that his discharge was a product of discrimination. In his complaint, he alleges:

> Defendant Ball did not want [him] back [after his medical leave] because "that Haitian guy thinks he's all that. He thinks he can make his own schedule. I can't understand half what that guy says." Additionally, Defendant Ball made fun of his accent and Defendant Ball stated that "He . . . would never work here again."

First Am. Compl. ¶ 23. Darbouze does not allege when Ball made the quoted statements, to whom he made them, the context in which they were allegedly made, or anything about the relationship between those statements and Ball's decision to terminate his employment.

As a preliminary matter, it is not at all clear that the statements on which Darbouze relies are direct evidence of discrimination. In this legal context, "'direct evidence' refers to 'a smoking gun' showing that the decision-maker relied upon a protected characteristic in taking an employment action." PowerComm, LLC v. Holyoke Gas & Elec. Dep't, 657 F.3d 31, 35 (1st Cir. 2011) (citing Smith v. F.W. Morse & Co., 76 F.3d 413, 421 (1st Cir. 1996)); see also Wennik v. PolyGram Grp. Distrib., Inc., 304 F.3d 123, 132 (1st Cir. 2002) ("Direct evidence 'consists of statements by a decisionmaker that directly reflect the alleged animus and bear squarely on the contested employment

decision.'") (quoting Kirk v. Hitchcock Clinic, 261 F.3d 75, 79 (1st Cir. 2001)); Patten, 300 F.3d at 25 (same) (citing Febres v. Challenger Carib. Corp., 214 F.3d 57, 60 (1st Cir. 2000). Moreover, while stray remarks, in combination with other evidence, may support a reasonable inference of discriminatory intent at the third stage of the McDonnell Douglas framework, see Straughn v. Delta Air Lines, Inc., 250 F.3d 23, 36 (1st Cir. 2001), stray remarks most assuredly do not, as Darbouze seems to suggest, count as direct evidence of discrimination. To the contrary, "[d]irect evidence of discrimination 'does not include stray remarks in the workplace, particularly those made by nondecisionmakers or statements made by nondecisionmakers unrelated to the decisional process itself.'" Ríos-Jiménez v. Principi, 520 F.3d 31, 40 (1st Cir. 2008) (quoting Ayala-Gerena, 95 F.3d at 96; citing Price Waterhouse v. Hopkins, 490 U.S. 228, 251-52 (1989)). Here, Darbouze does not allege any facts, much less produce any evidence, to relate the comments he ascribes to Ball to the decisionmaking process.

There is, however, an even larger problem with Darbouze's reliance on the remarks he ascribes to Ball. He has produced no admissible evidence that Ball ever made them. Darbouze's complaint does not allege who Ball spoke to about his national origin, accent, and prospects for future employment. During his deposition, Darbouze testified that he did not hear Ball make

the remarks alleged in his complaint, and that the only person who heard them was Kelly Carey. Pl.'s Obj. to Summ. J., Ex. A (doc. no. 26), at 92-94. More specifically, he testified as follows:

> Q. And what do you believe David Ball said to prevent you from being employed?
>
> A. But the thing is, the comment he made, he said, this guy thinks he's all that.
>
> Q. Who did he say that to?
>
> A. Kelly told me that. I said, Kelly, do you know why he's been lying, saying there was no job whenever I call, and she said, did you try to make your own schedule, and I said, no, and she said, Dave Ball said you own a security company and that you tried to make your own schedule and that you think you're all that. That's what he said - this person thinks he's all that, he will never come back to work here.

Id. at 92. The deposition continued:

> Q. Are those all of the comments that you believe David Ball made about you.
>
> A. I don't know. There might be more. I don't know.
>
> Q. Do you have any reason to believe there are more?
>
> A. I don't know.
>
> Q. I'm sorry. Can you speak up?
>
> Q. I don't know.
>
> Q. So to be clear, in this deposition have you told us all of the comments you believe David Ball made about you?

> A. I know that there was a problem with my accent. He said he could not understand me.
>
> Q. Who did he say that to you?
>
> A. That's what Kelly said. She said that he said that.
>
> Q. And he said that to Kelly Carey?
>
> A. I don't know.
>
> Q. Do you know if he said it to anyone else?
>
> A. I don't know.

Id. at 93-94. While Darbouze's memorandum of law cites his deposition as evidentiary support for his allegation that Ball said "that Haitian thinks he's all that," Pl.'s Mem. of Law (doc. no. 25-1), at 8, none of the deposition pages he cites include any mention of comments by Ball concerning his national origin or race. In addition, the court's own examination of the deposition revealed no testimony about such remarks.

During discovery, Ball propounded an interrogatory asking Darbouze to describe all the facts supporting his allegations about Ball's remarks. Darbouze responded:

> I do not recall specifically when Defendant Ball made the comments that he made. However, I do know that they were sometime between June 7, 2007 through April 29, 2008. Again, the comments were made to office personnel, and then relayed to me.

Defs.' Mot. Summ. J., Ex. C-1 (doc. no. 17-22), at 6.

Defendants have also produced an affidavit from Carrie Keeley, who, all appear to agree, is the person Darbouze called

"Kelly Carey" in his deposition.[6] In her affidavit, Keeley stated:

> I did not hear David Ball make any negative remarks about Mr. Darbouze including remarks related to his race or national origin.
>
> I did not hear any other DHHS employees make any negative remarks about Mr. Darbouze including remarks about his race or national origin.
>
> The only comments I recall David Ball making about Mr. Darbouze related to their inability to come to an agreement regarding scheduling. David Ball said something to the effect of Mr. Darbouze wants to make his own schedule.

Defs.' Mot. Summ. J., Ex. I (doc. no. 17-29), ¶¶ 6-8.[7]

The bottom line is this. Even if the comments alleged in paragraph 23 of Darbouze's FAC counted as direct evidence of discrimination – and the court harbors serious doubts that they even qualify as evidence of discriminatory intent for purposes of a McDonnell Douglas pretext analysis – Darbouze has produced no admissible evidence that Ball ever made the comments about his national origin and accent that are attributed to him in the complaint. All Darbouze has is his deposition testimony about what he says Keeley said Ball said about him. That, of course, is nothing more than inadmissible hearsay on which Darbouze is

[6] Carrie Keeley also appears to be the person called "Kari Kiley" in Ball's deposition. See Pl.'s Obj. to Summ. J., Ex. C (doc. no. 26-2), at 56.

[7] Another SYSC employee, Jessica Gelinas, has testified to similar effect. See Defs.' Mot. Summ. J., Ex. H (doc. no. 17-28), ¶¶ 5-6.

not entitled to rely. See Fed. R. Civ. P. 56(c)(2); Meuser, 564 F.3d at 515. Moreover, not that it is legally significant, Darbouze's inadmissible hearsay concerning Ball's remarks is directly contradicted by Keeley's admissible testimony about what Ball said to her, and by Ball's admissible testimony about what he said to Keeley.[8] With regard to his argument that he has produced direct evidence that he was discharged because of his national origin or race, Darbouze has not come close to creating a genuine issue of material fact.

3. Circumstantial Evidence

Darbouze's attempt to invoke circumstantial evidence under the McDonnell Douglas framework fares no better; he has failed to establish a prima facie case that his discharge was based on his national origin or race.

When a plaintiff claims to have been discharged because of national origin or race, he "has the burden of showing, by a preponderance of the evidence, a prima facie case of

[8] At Ball's deposition, the following exchange focused on Ball's attitude toward Darbouze's accent:

Q. All right. Make any comments about his accent?
A. No.
Q. Hard to understand him or anything?
A. No.

Pl.'s Obj. to Summ. J., Ex. C. (doc. no. 26-2), at 57.

discrimination." Windross v. Barton Prot. Servs., Inc., 586 F.3d 98, 103 (1st Cir. 2009) (citation omitted).

> To establish a prima facie case of racial discrimination, [a Title VII plaintiff] must show that (1) he belonged to a protected class, a racial minority; (2) he was performing his job at a level that rules out the possibility that he was fired for job performance; (3) he suffered an adverse job action by his employer; and (4) his employer sought a replacement for him with roughly equivalent qualifications. Smith v. Stratus Computer, Inc., 40 F.3d 11, 15 (1st Cir. 1994); see also [St. Mary's Honor Ctr. v.] Hicks, 509 U.S. [502,] 506 [(1993)]; McDonnell Douglas, 411 U.S. at 802. This initial burden is not an onerous one, [Tex. Dep't of Cmty. Affairs v.] Burdine, 450 U.S. [248,] 253 [(1981)].

Benoit, 331 F.3d at 173 (parallel citations omitted); see also Windross, 586 F.3d at 103.

a. Darbouze's Prima Facie Case

Darbouze, a black Haitian, is a member of a protected class, which establishes the first element of his prima facie case. See Benoit, 331 F.3d at 173. Darbouze's removal from the SYSC payroll list establishes the third element, an adverse job action.[9]

Darbouze runs into difficulty, however, with the second element of his prima facie case, which requires him to show that "he was performing his job at a level that rules out the

[9] Given that when he was removed from the payroll list, Darbouze had not worked any shifts at SYSC for eight months, it is certainly arguable that his removal was an act of administrative housekeeping, not an adverse job action.

possibility that he was fired for job performance." Benoit, 331 F.3d at 173. Darbouze's job, such as it was, was a part-time position which he "performed" by being part of a pool of individuals available to be called upon, when and if needed, to fill in for full-time Youth Counselors at SYSC. It is undisputed that: (1) when Darbouze's part-time employment was terminated, he had not worked a shift in more than eight months; and (2) Darbouze was unwilling to work the shifts Ball had offered him in August and September of 2007. In his objection to summary judgment, Darbouze neither refers to the elements of a prima facie Title VII discriminatory-discharge claim nor gives any indication of how he has established that he was filling his position in a way that rules out the possibility that he was discharged for performance-related reasons. A twice-demonstrated unwillingness to work the weekend and evening shifts for which Ball most needed coverage would certainly seem to be a legitimate performance-based reason for dropping Darbouze from the list of those available to work part-time as a Youth Counselor I. Even so, the court will assume that Darbouze has established the second element of his prima facie case.

Darbouze's showing on the fourth element of his prima facie case is even weaker than his showing on the second element. To satisfy his burden of showing that "his employer sought a replacement for him with roughly equivalent qualifications,"

Benoit, 331 F.3d at 173, Darbouze argues that his "original position was filled by a Caucasian, American-born intern," Pl.'s Mem. of Law (doc. no. 25-1), at 10.[10] As evidentiary support, he points to the underlined portion of the following passage from Ball's deposition:

> Q. So, in September, the summer intern or employee had left at that point?
>
> A. There were several of them.
>
> Q. Several.
>
> A. There [were] I think nine of them.
>
> Q. Is it standard procedure to fill an employee's spot when that employee goes out on leave?
>
> A. It depends on the terms. If it's – and , no, it isn't. Even a full-time permanent staff we have to get permission to fill it with a temporary staff.
>
> With part-timers, it's kind of almost like a pool, so there isn't an exact numbered position that you would replace somebody.

Pl.'s Obj. to Summ. J., Ex. C (doc. no. 26-2), at 20-21. The subject of the foregoing portion of Ball's deposition appears to be how he responded to Darbouze's going out on leave in June of 2007, not whether or how he sought to fill Darbouze's position after he was discharged in February of 2008. In other words, Darbouze has produced no evidence to show that Ball sought a

[10] Darbouze does not indicate whether the "original position' to which he refers is the full-time position, or the part-time position he took after resigning his full-time position.

similarly qualified replacement for him after his removal from the payroll list in February of 2008. Accordingly, Darbouze has failed to establish his prima facie case.

b. Pretext

Even assuming that Darbouze had established his prima facie case, and that defendants have offered a legitimate non-discriminatory reason for his discharge, which Darbouze appears to concede, his claims would still fail at the third stage of the McDonnell Douglas framework, which requires him to show that the reasons proffered for his discharge were a mere pretext for discrimination. Defendants say that Darbouze's part-time employment as a Youth Counselor I was terminated in February of 2008 because he had not worked a shift since June of 2007, and had not been in contact with Ball since September of 2007. Darbouze says those reasons are pretextual.

"There is 'no mechanical formula' for determining pretext." McDonough v. City of Quincy, 452 F.3d 8, 18 (1st Cir. 2006) (quoting Che v. Mass. Bay Transp. Auth., 342 F.3d 31, 39 (1st Cir. 2003)). Rather, "pretext can be proven in many ways." McDonough, 452 F.3d at 18 (citing Santiago-Ramos, 217 F.3d at 55). Here, Darbouze argues that the pretextual nature of the explanation given for his discharge is demonstrated by: (1) indirect evidence in the form of "weaknesses, implausibilities,

inconsistencies, incoherencies, or contradictions in [DHHS's] proffered legitimate reasons," Santiago-Ramos, 217 F.3d at 56 (quoting Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 168 (1st Cir. 1998)); and (2) direct evidence in the form of stray remarks that prove Ball's animus against him based on his national origin or race. The court does not agree.

Weakness of the proffered explanation. A Title VII plaintiff "may show pretext by establishing weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons such that a factfinder could infer that the employer did not act for the asserted non-discriminatory reasons." Martinez-Burgos v. Guayama Corp., 656 F.3d 7, 14 (1st Cir. 2011) (citation and internal quotation marks omitted). The problem with Darbouze's argument is that he does not point out any inconsistency or other weakness in the reasons proffered for his discharge. Defendants say Darbouze was discharged because, as of February of 2008, he had not worked a single shift since July of 2007. Darbouze offers no evidence to undercut the plausibility of that explanation or the accuracy of its factual premise. Rather, in the section of his memorandum devoted to his inconsistency argument, he mentions: (1) Ball's alleged problem with his accent; and (2) his replacement by a summer intern (presumably in June of 2007), despite Ball's testimony that summer interns

are not normally given permanent positions at DHHS.[11] Assuming for the sake of argument that Darbouze has produced admissible evidence of either Ball's dislike of his accent or his replacement by an intern, which he has not,[12] neither of those things has any bearing on the plausibility of the explanation given for Darbouze's discharge, i.e., the fact that as of February of 2008, he had not worked a single shift at SYSC in approximately eight months. That is, Darbouze has identified nothing about the reason given for his termination that is weak, implausible, inconsistent, incoherent, or contradictory. Accordingly, Darbouze's first attempt at demonstrating pretext falls far short of the mark.

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[11] Darbouze does not say when he was allegedly replaced by an intern, but there is nothing in either his memorandum or the record to suggest that he was replaced by an intern after his discharge in February of 2008.

[12] As evidence of Ball's dislike of his accent, Darbouze directs the court to: (1) his own deposition testimony that Carrie Keeley told him that Ball had told her that he had trouble understanding Darbouze; and (2) an interrogatory answer in which he reported two statements he attributed to Ball, neither of which concerned his accent. As evidence of his replacement by an intern, in contravention of DHHS policy, Darbouze directs the court to the underlined portion of Ball's deposition:

> Q. Is it standard procedure to fill an employee's spot when that employee goes out on leave?
> A. It depends on the terms. If it's – and, no, it isn't. Even a full-time permanent staff we have to get permission to fill with a temporary staff.

Pl.'s Obj. to Summ. J, Ex. C (doc. No. 26-2), at 20.

Stray remarks. "[S]tray workplace remarks, as well as statements made either by non-decisionmakers or by decisionmakers not involved in the decisional process, normally are insufficient, standing alone, to establish either pretext or the requisite discriminatory animus." Meléndez v. Autogermana, Inc., 622 F.3d 46, 54 (1st Cir. 2010) (quoting Gonzalez v. El Dia, Inc., 304 F.3d 63, 69 (1st Cir. 2002) (internal quotation marks omitted). On the other hand, evidence of such "comments may be sufficient to support an inference of pretext and discriminatory animus." Meléndez, 622 F.3d at 54 (citing Domínguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 433 (1st Cir. 2000)). The probative value of such comments, however, is directly related to their temporal and contextual proximity to the decisionmaking process. See Meléndez, 622 F.3d at 54 (citing Rivera-Aponte v. Rest. Metropol #3, Inc., 338 F.3d 9, 12 (1st Cir. 2003)); see also McMillan v. Mass. SPCA, 140 F.3d 288, 301 (1st Cir. 1998) (citing Armbruster v. Unisys Corp., 32 F.3d 768, 779 (3d Cir. 1994); Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 545 (3d Cir. 1992)).

Here, Darbouze cannot recall when Ball made remarks about his national origin or race, other than to say "that they were [made] sometime between June 7, 2007 through April 29, 2008." Defs.' Mot. Summ. J., Ex. C-1 (doc. no. 17-22), at 6. Thus, there is no factual basis for linking Ball's alleged remarks to

his decision to discharge Darbouze. Moreover, Darbouze has produced only inadmissible hearsay evidence that Ball commented on his accent and has not even produced hearsay evidence that Ball ever referred to him as Haitian, much less that he did so disparagingly. Accordingly, Darbouze's second attempt at demonstrating pretext also fails.[13]

4. Summary

Because Darbouze has not established a prima facie case of discriminatory discharge, and has not produced evidence sufficient to show that defendants' proffered reasons for his discharge are pretextual, defendants are entitled to judgment as a matter of law on Counts I and II.

B. Counts III and IV

In Counts III and IV, Darbouze claims that Ball, LaFleur, and other DHHS employees failed to hire him for five separate positions because of his national origin (Count III) and his race (Count IV). Defendants move for summary judgment, arguing that: (1) Darbouze has failed to produce sufficient facts to establish that he was qualified for any of those five positions;

[13] Darbouze's stray-remarks argument also refers to Ball's alleged failure to send him for training, contrary to DHHS policy, but whether Ball sent Darbouze to required training has no bearing on whether Ball made remarks from which one could infer animus based on Darbouze's national origin or race.

and (2) Darbouze has not established that those positions were filled by candidates with qualifications less than or equal to his own. Darbouze contends that he has produced both direct evidence of discrimination and evidence sufficient to show that the reasons proffered for not hiring him are pretextual. The court does not agree.

1. Legal Principles

It is unlawful for an employer "to fail or refuse to hire . . . any individual . . . because of such individual's race, color, . . . or national origin." 42 U.S.C. § 2000e-2(a)(1). "[T]he elements of a failure-to-hire claim are: (i) that the plaintiffs are members of a protected class; (ii) that they were qualified for the position to which they aspired; (iii) that they were not hired; and (iv) that a person possessing similar or inferior qualifications was hired." Ahern v. Shinseki, 629 F.3d 49, 54 (1st Cir. 2010) (citing Morón-Barradas v. Dep't of Educ., 488 F.3d 472, 478 (1st Cir. 2007); Keyes v. Sec'y of Navy, 853 F.2d 1016, 1023 (1st Cir. 1988)).

2. Darbouze's Prima Facie Case

Darbouze is a member of a protected class, see Benoit, 331 F.3d at 173, and he was not hired for the five positions on which he bases his failure-to-hire claims. Accordingly, he has established the first and third elements of his prima facie

case. Moreover, despite some uncertainty, the court will assume that Darbouze has established that he was qualified for all five positions by showing that he was interviewed for all of them, based on a determination by the DHHS Bureau of Human Resources that he met the minimum qualifications for those positions.[14] The problem arises with the fourth element of the prima facie case.

To establish that element, Darbouze must show "that a person possessing similar or inferior qualifications was hired." Ahern, 629 F.3d at 54.[15] Darbouze has admitted, however, that he has "no information or evidence that the persons selected for each of the positions that [he] applied for did not have more

[14] Defendants challenge the concept that an internal candidate who is certified as meeting the minimum qualifications is actually qualified for a position, for purposes of Title VII, and their material facts on this issue have been deemed admitted. See Pl.'s Mem. of Law (doc. no. 17), at 2. Even so, the court will assume that Darbouze has established the second element of his prima facie case. That is a particularly generous assumption, given Darbouze's failure to produce any of the relevant job descriptions.

[15] Darbouze appears not to recognize that the fourth element of the prima facie case has a comparative component that requires an examination of his qualifications vis-à-vis those of the successful applicants, or those of the applicants defendants continued to seek, see McDonnell Douglas, 411 U.S. at 802 (describing fourth element as requiring a plaintiff to show "that, after his rejection, the position remained open and the employer continued to seek [applications] from persons of complainant's qualifications"). In his recitation of the elements of a prima facie case, Darbouze omits the phrase underlined above.

relevant experience than [him]." Defs.' Mot. Summ. J., Ex. C-1 (doc. no. 17-21), at 3, 5. That is that. But there is more. Not that they needed to, defendants have produced evidence, necessarily undisputed, that for each of the five hirings Darbouze challenges, the candidate selected over him had substantially more relevant experience. See Defs.' Mot. Summ. J., Ex. A (doc. no. 17-2) ¶¶ 15-19. While there might be room for arguing that, perhaps, one of the positions Darbouze sought (FSS Trainee, # 12681) was filled by a candidate with qualifications roughly commensurate to his, he has not produced the job description for that position which would be essential for any meaningful comparison. And, even after being provided with the application of the successful candidate, Darbouze has not argued that his qualifications equaled or exceeded the qualifications of that candidate. Darbouze does point out that all of the five positions he sought were filled by American-born Caucasian applicants, but that is not enough to establish the fourth element of a prima facie case of discriminatory failure to hire. See Ahern, 629 F.3d at 54 (explaining that fourth element requires a showing "that a person possessing similar or inferior qualifications was hired"). In short, Darbouze has failed, by a wide margin, to establish a prima facie case of discriminatory failure to hire.

3. Pretext

Even if he had established his prima facie case, however, Darbouze would not be able to establish that the reasons proffered for hiring other candidates, i.e., their greater relevant experience, was pretextual. As with his discriminatory-discharge claim, Darbouze argues that pretext is demonstrated by inconsistencies in the proffered explanations and stray remarks. Neither argument is persuasive.

With regard to the consistency of the proffered explanations, all but one of Darbouze's arguments concern Ball's attitude toward him, but the court has deemed admitted the fact that Ball "was not responsible for the hiring of any of the five positions at issue in this case." Defs.' Mem. of Law (doc. no. 17-1), at 3. Thus, Ball's attitude toward Darbouze is entirely immaterial to Darbouze's failure-to-hire claim. Darbouze's remaining evidence of inconsistency, the fact that all the positions for which he applied were filled by Caucasian Americans, has no bearing on their relevant experience, which was the basis for the decisions to hire them. Darbouze's reliance on stray remarks is equally unavailing for the reasons explained in the previous section, plus the fact that Ball played no role in any of the disputed hiring decisions. In this regard, Darbouze's unsupported belief that all DHHS administrators are somehow in cahoots, no matter how sincerely

held, see Pl.'s Obj. to Summ. J., Ex. A. (doc. no. 26), at 87-92, is insufficient to create a genuine issue of material fact on this issue, in light of the admitted fact that Ball had no role in any of the five disputed hiring decisions.

4. Summary

Because Darbouze has not established a prima facie case of discriminatory failure to hire, and has not produced evidence sufficient to show that defendants' proffered reasons for declining to hire him are pretextual, defendants are entitled to judgment as a matter of law on Counts III and IV.

C. Counts V and VI

In Counts V and VI, Darbouze asserts that by virtue of the five disputed decisions not to hire him, made by Ball, LaFleur, and other DHHS employees, DHHS retaliated against him for making an internal complaint about discrimination (Count V) and for filing a formal charge of discrimination with the HRC (Count VI). Defendants move for summary judgment on Darbouze's retaliation claims, arguing that he has not demonstrated any causal connection between his protected activity and the decision not to hire him. They further argue that even if Darbouze can establish his prima facie case, he cannot establish that the proffered reasons for the decisions not to hire him are pretextual. Darbouze disagrees, categorically.

1. Legal Principles

It is unlawful for an employer "to discriminate against . . . applicants for employment . . . because [they have] opposed any practice made an unlawful employment practice by this subchapter, or because [they have] made a charge . . . under this subchapter." 42 U.S.C. § 2000e-3(a). That is, "Title VII expressly forbids not only direct discrimination, but also retaliation against an individual who has complained about discriminatory employment practices." Velazquez-Ortiz v. Vilsack, 657 F.3d 64, 72 (1st Cir. 2011) (citing Ahern, 629 F.3d at 55. "To succeed on a retaliation claim, a plaintiff must show that [his] employer took some objectively and materially adverse action against [him] because [he] opposed a practice forbidden by Title VII, such as race discrimination." Bhatti v. Trs. of Boston Univ., 659 F.3d 64, 73 (1st Cir. 2011) (citing Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 59, 68 (2006)).

"In order to establish a prima facie case of retaliation, a plaintiff must show that [he] 'engaged in protected activity,' that [he] was the subject of an adverse employment action, and that the action was causally linked to [his] involvement in the protected activity." Velazquez-Ortiz, 657 F.3d at 72 (citation omitted). Regarding the third element of the prima facie case:

> For causality to be established, the plaintiff must show a nexus between the protected conduct and the alleged retaliatory act. Wright [v. CompUSA, Inc.], 352 F.3d [472,] 478 [(1st Cir. 2003)]; see also Tobin v. Liberty Mut. Ins. Co., 433 F.3d 100, 104 (1st Cir. 2005) (noting that to establish a prima facie case of retaliation, a plaintiff must show that the defendant "took an adverse employment action against him because of, in whole or in part, his protected [conduct]"). "One way of showing causation is by establishing that the employer's knowledge of the protected activity was close in time to the employer's adverse action." Wyatt v. City of Boston, 35 F.3d 13, 16 (1st Cir. 1994).

Colon-Fontanez v. Municipality of San Juan, 660 F.3d 17, 37 (1st Cir. 2011).

Moreover, "[f]or the causation element to be satisfied, the employer must have taken the allegedly retaliatory action after the employee engaged in protected conduct." Taite v. Shineski, No. 08-cv-258-SM, 2010 WL 745160, at *19 (D.N.H. Mar. 1, 2010) (citing Sabinson v. Trs. of Dartmouth Coll., 542 F.3d 1, 5 (1st Cir. 2008)). Finally, "for an employment action to be retaliatory, the person taking that action must have known about the employee's protected conduct at the time he or she took the allegedly retaliatory action." Taite, 2010 WL 745160, at *19 (citing Pomales v. Celulares Telefónica, Inc., 447 F.3d 79, 85 (1st Cir. 2006); Koseris, 331 F.3d at 217, Santiago-Ramos, 217 F.3d at 57-58; King v. Town of Hanover, 116 F.3d 965, 968 (1st Cir. 1997)). "Once the plaintiff establishes a prima facie showing of retaliation, the McDonnell Douglas burden-shifting

approach applies." Enica v. Principi, 544 F.3d 328, 343 (1st Cir. 2008) (citing Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 26 (1st Cir. 2004)).

A "defendant can support a motion for summary judgment by showing that the adverse employment action was taken for a non-retaliatory reason." Rivera-Colón v. Mills, 635 F.3d 9, 12 (1st Cir. 2011) (citing Collazo v. Bristol-Myers Squibb Mfg., Inc., 617 F.3d 39, 46 (1st Cir. 2010)). "In such [a] case, the plaintiff can defeat summary judgment by showing evidence sufficient to raise a material issue of fact as to whether retaliation was in fact a cause of the adverse action." Rivera-Colón, 635 F.3d at 12; see also Collazo, 617 F.3d at 50 ("To withstand summary judgment, a plaintiff need not prove by a preponderance of the additional evidence that [retaliation] was in fact the motive for the action taken. All a plaintiff has to do is raise a genuine issue of fact as to whether [retaliation] motivated the adverse employment action.") (citation and internal quotation marks omitted).

2. Retaliation for Darbouze's Internal Complaint

Darbouze's first retaliation claim, as stated in the FAC, is that defendants retaliated against him for making an internal complaint of discrimination by failing to hire him for five different positions. In his memorandum of law, however,

Darbouze states that "[i]mmediately after complaining about violations of his human rights, Defendant DHHS terminated him." Pl.'s Mem. of Law (doc. no. 25-1), at 14. That statement certainly seems to suggest that Darbouze is arguing that his discharge was an act of retaliation for his internal complaint.[16] But, it is entirely unclear whether he intends to replace the retaliatory act actually alleged in Count V, i.e., DHHS's failure to hire him, with a different act, i.e., his discharge, or is now asserting that both his discharge and DHHS's failure to hire him were acts of retaliation for his internal complaint. In any event, because no retaliatory-discharge claim appears in Darbouze's First Amended Complaint, the court disregards Darbouze's discharge as an adverse employment action in the context of his retaliation claim[17] and proceeds with the understanding that Count V, like Count VI, asserts a retaliation claim based on DHHS's failure to hire Darbouze.

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[16] Given Darbouze's allegation that he made his internal complaint in late April, see First Am. Compl. ¶ 24, his suggestion that he was discharged immediately thereafter appears to conflate his dismissal in February with the formal letter of separation he received in May.

[17] Such a theory would also face an insurmountable substantive impediment. Darbouze was discharged in mid February and learned of his discharge no later than the end of that month. His First Amended Complaint alleges that he made his internal complaint of discrimination at the end of April, long after he had been discharged. DHHS cannot have retaliated against Darbouze in February for something he did not do until April. See Taite, 2010 WL 745160, at *19.

a. Darbouze's Prima Facie Case

In his complaint, Darbouze makes two allegations relevant to Count V: (1) "[o]n April 29, 2008, [he] reported violations of his civil rights to DHHS," First Am. Compl. ¶ 24; and (2) "[w]hile his applications were pending, [he] complained to DHHS that its employees were violating his civil rights," id. ¶ 59. Darbouze does not describe his internal complaints any more specifically than that; he does not say to whom at DHHS he complained, nor does he describe the conduct about which he complained. His evidence at summary judgment on the first element of his prima facie case includes the following interrogatory answer:

> I complained both internally and to the New Hampshire Commission for Human Rights about violations to my civil rights. Defendant Ball, my supervisor then terminated me, in close proximity to those complaints, for either complaining about my rights being violated or because I am of a different race or national origin, or for all those reasons. In any event, public policy encourages the types of complaints that I made, and public policy encourages a discrimination-free workplace. By way of further answer, please see my First Amended Complaint.

Pl.'s Obj. to Summ. J., Ex. F. (doc. no. 25-4), at 4. Darbouze also cites to two passages from Ball's deposition, see id., Ex. C (doc. no. 26-2), at 26, 54-55, but those passages concern Ball's conversation with Darbouze in late February, in which Ball told Darbouze why he had been discharged. As that conversation took place long before Darbouze allegedly made his

internal report to DHHS, it has no relevance to his retaliation claim.

It is not at all clear that Darbouze's FAC could survive a motion to dismiss Count V, given that it is entirely conclusory. See United Auto., Aero., Agric. Impl. Workers of Am. Int'l Union v. Fortuño, 633 F.3d 37, 41 (1st Cir. 2011) ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'") (quoting Ashcroft v. Iqbal, 556 U.S. 662, ___, 129 S. Ct. 1937, 1949 (2009)). His objection to summary judgment is no better. It provides no evidence concerning what Darbouze said, specifically, about discrimination, or to whom, at DHHS, he complained. But, because "the employee's burden to establish a prima facie case in the retaliation context 'is not an onerous one,'" Taite, 2010 WL 745160, at *18 (quoting Dennis v. Osram Sylvania, Inc., 549 F.3d 851, 858 (1st Cir. 2008)), the court will presume that Darbouze engaged in protected activity.

The real problem involves the third element of the prima facie case, causation. Defendants point out, correctly, that Darbouze has not alleged that Ball, LaFleur, or any of the unnamed "other employees" to whom he attributes the decisions not to hire him were aware of his internal complaint of

discrimination.[18] In his objection to summary judgment, Darbouze does not address that argument, and he has produced no evidence of any sort tending to show that any person who declined to hire him knew about his internal complaint. Because an employment action cannot be retaliatory, for Title VII purposes, unless the person taking the action knew about the employee's protected activity, see Taite, 2010 WL 745160, at *19, Darbouze's failure to produce evidence that those who did not hire him knew about his protected activity scuttles his prima facie case for retaliatory failure to hire based on his internal complaint.

b. Pretext

Even if Darbouze had established his prima facie case, he has not shown that the reasons given for hiring others – their superior qualifications – are pretextual. That is, he has failed to "raise a genuine issue of fact as to whether [retaliation] motivated the adverse employment action." Collazo, 617 F.3d at 50. In the section of his memorandum where he argues that the reasons given for hiring others were mere pretext intended to disguise retaliation for his protected activity, Darbouze says, with purported record support, that:

[18] Given the requirement in a retaliation claim that the decisionmaker must have known of the protected activity, see Taite, 2010 WL 745160, at *19, plus the undisputed fact that neither Ball nor LaFleur were the decisionmakers who declined to hire Darbouze, his failure even to allege who made those decisions is probably fatal to the claim stated in Count V.

(1) when he asked Ball whether there were open positions at DHHS, Ball falsely told him there were none;[19] (2) Ball communicated with those involved in making the hiring decisions at issue in Count V; and (3) Ball instructed other DHHS employees not to hire him. Leaving aside the lack of record support for most of those contentions,[20] Darbouze's reliance on

[19] One gets the sense from Darbouze's deposition and the arguments advanced by counsel that Darbouze believes that Ball owed him a duty to: (1) provide him with convenient shifts he could work part-time; (2) bring him back to SYSC on a full-time basis (notwithstanding that he never re-applied for a full-time Youth Counselor I position); and/or (3) help him find other positions in DHHS. He provides no legal support for those expectations.

[20] For example, in his memorandum of law, Darbouze says that he testified that he was "aware that Defendant Ball instructed hiring officials not to hire him." Pl.'s Mem. of Law (doc. no. 25-1), at 15. For evidentiary support he cites the following passage from his deposition:

> Q. So you're saying he's influencing the individuals who are doing the hiring?
> A. Yeah. I think so, yeah.
> Q. And who are those individuals?
> A. I think Margaret [LaFleur].
> Q. And what is David Ball's connection to Margaret?
> A. They work in the same department.
> Q. Okay. Who else?
> A. I don't know. Whoever is in there. I don't remember exactly. I don't recall everybody's name.

Pl.'s Obj. to Summ. J., Ex. A (doc. no. 26), at 91-92. That testimony is far too speculative to count as competent evidence of Ball's participation in the decisions not to hire Darbouze. See Meuser, 564 F.3d at 515 (explaining that party opposing summary judgment "cannot rest on conclusory allegations, improbable inferences, [or] unsupported speculation") (citation and internal quotation marks omitted).

them is unavailing because none of them address the paramount issue in a pretext analysis: the strength, plausibility, consistency, and coherence of the reasons given for the adverse employment action. Because none of the issues Darbouze discusses in his pretext analysis have any bearing on the strength of defendants' explanation that candidates more qualified than him were hired to fill the positions for which he applied, he has failed to establish that defendants' explanation is a pretext for discrimination.

3. Retaliation for Darbouze's HRC Complaint

There is no need to belabor the claim stated in Count VI, i.e., that Ball, LaFleur, and other DHHS employees did not hire Darbouze in retaliation for his having filed a formal charge of discrimination with the HRC. Darbouze filed his charge of discrimination on May 28, 2008. The Commissioner of the New Hampshire Juvenile Justice System was notified of the charge by letter dated May 30, 2008. Two of Darbouze's five rejections (for positions 41050 and 12507) predated the filing of his charge and, necessarily, predated DHHS's knowledge of that charge. Those rejections, then, cannot have been acts of retaliation for Darbouze's complaint to the HRC. See Taite, 2010 WL 745160, at *19. As for the remaining three rejections, Darbouze has produced no evidence that any of the relevant

decision makers were aware of his protected activity, which means that his prima facie case falters on the causation element. Beyond that, for the same reasons that apply to the claim asserted in Count V, Darbouze has not created a genuine issue of material fact regarding pretext.

4. Summary

Because Darbouze has not established a prima facie case of retaliatory failure to hire, and has not produced evidence sufficient to show that defendants' proffered reasons for declining to hire him are pretextual, defendants are entitled to judgment as a matter of law on Counts V and VI.

D. Counts VII and IX

In Count VII, Darbouze asserts that Ball violated his federal constitutional right to equal protection by failing to hire him for five positions at DHHS. In Count IX, he asserts the same claim against LaFleur. Defendants move for summary judgment, arguing that Darbouze has failed to produce evidence that: (1) he was qualified for the positions for which he applied; (2) Ball or LaFleur were responsible for the hiring decisions at issue; or (3) any of Ball's or LaFleur's conduct toward him was motivated by animus based on his national origin or race. Darbouze objects, arguing that he has created a genuine issue of material fact on his equal-protection claims.

Specifically, he argues that he has produced evidence that: (1) Ball and LaFleur took his national origin and race into account when deciding to discharge him[21] and/or deciding not to hire him; (2) LaFleur had the authority to fill the positions for which he applied; and (3) Ball communicated with other individuals, including LaFleur, who had hiring authority over the positions for which he applied.

Darbouze has produced no such evidence. He has produced no evidence, not even in his own deposition, that Ball or LaFleur ever said a word about his national origin, his race, or his accent. The court has deemed admitted the fact that neither Ball nor LaFleur had hiring authority over any of the five positions at issue here, and the "evidence" Darbouze identifies as support for the proposition that LaFleur had the authority to hire him to fill the positions at issue here consists of the underlined portion of the following passage from LaFleur's deposition:

> Q. And are you granted with the authority to hire and/or fire –
>
> A. Yes.
>
> Q. – employees?

[21] While Darbouze mentions his discharge in his memorandum of law, Count VII, as asserted in the FAC, is limited to defendants' failure to hire him. The court will follow the FAC and treat Count VII as being based only on defendants' failure to hire Darbouze.

A. Yes.

Pl.'s Obj. to Summ. J., Ex. E (doc. no. 26-3), at 8. That LaFleur could hire applicants to fill some positions is hardly evidence that she was responsible for filling the positions at issue here. Because it has been deemed admitted that neither Ball nor LaFleur were responsible for hiring applicants to fill the positions at issue here, Ball and LaFleur are entitled to judgment as a matter of law on Darbouze's federal equal-protection claims.

E. Counts VIII and X

In Count VIII, Darbouze asserts that Ball violated his state constitutional right to equal protection by failing to hire him for five positions at DHHS. In Count X, he asserts the same claim against LaFleur. Ball and LaFleur are entitled to judgment as a matter of law on Counts VIII and X for the same reasons that support judgment in their favor on Counts VII and IX. Beyond that, the court notes that in Marquay v. Eno, the New Hampshire Supreme Court expressly declined to recognize a private right of action to enforce the constitutional rights on which Counts VIII and X are based, see 139 N.H. 708, 721-22 (1995), which is yet another reason why defendants are entitled to judgment as a matter of law on Counts VIII and X.

F. Counts XI and XII

In Counts XI and XII, Darbouze asserts that Ball is liable directly, and Toumpas and DHHS are liable vicariously, for wrongful termination under the common law of New Hampshire. Darbouze's theory is that Ball discharged him for making his internal complaint of discrimination and for lodging a formal charge of discrimination with the HRC. Defendants move for summary judgment, arguing that Darbouze has failed to allege sufficient facts to support a claim that his discharge was motivated by bad faith, retaliation, or malice. They further argue that Darbouze's wrongful termination claims fail as a matter of law because he has a statutory remedy for his wrongful termination. Darbouze objects, arguing that he has raised genuine issues of material fact. He is mistaken.

Darbouze was discharged in mid February of 2008. He was aware of his discharge by the end of that month. Given his knowledge of his discharge at that time, the letter he received from Ball in mid May is of no moment; that letter merely confirmed what had already taken place, i.e., Darbouze's removal from the SYSC payroll list. Darbouze alleges that he made his internal complaint in late April of 2008, and his formal charge of discrimination is dated May 28. Because he was discharged long before he made either his internal complaint or his formal charge of discrimination, there is no factual basis for his

claim that he was discharged because he made those complaints. Accordingly, defendants are entitled to judgment as a matter of law on Counts XI and XII.

G. Counts XIII and XIV

In Counts XIII and XIV, Darbouze asserts that Ball is liable directly, and Toumpas and DHHS are liable vicariously, for defamation. Specifically, Darbouze asserts that "Defendant Ball stated, untruthfully and defamatorialy that '[t]hat Haitian guy thinks he's all that.'" First Am. Compl. ¶ 103. Defendants move for summary judgment, arguing that: (1) the allegedly defamatory statement is a non-actionable statement of opinion; and (2) Darbouze has produced no evidence of publication. Darbouze objects, but does not address defendants' argument that the allegedly defamatory statement was merely an opinion. Rather, he argues that his deposition and one of his interrogatory answers, along with Ball's admission "that he did say something about Mr. Darbouze and some 'inability to agree on a schedule,'" Pl.'s Mem. of Law (doc. no. 25-1), at 16, is sufficient to create a triable question of fact on his claim that Ball's statements defamed him by tarnishing his "reputation as a 'very humble and hardworking individual,'" id.

In New Hampshire, "a statement of opinion is not actionable . . . unless it may reasonably be understood to imply the

existence of defamatory fact as the basis for the opinion." Nash v. Keene Publ'g Corp., 127 N.H. 214, 219 (1985) (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974); Pease v. Telegraph Publ'g Co., 121 N.H. 62, 65 (1981); Duchesnaye v. Munro Enters., Inc., 125 N.H. 244, 249 (1984); Restatement (Second) of Torts § 566 (1977)). The court is strongly inclined to agree with defendants that the statement on which Darbouze's defamation claims are based, i.e., "[t]hat Haitian guy thinks he's all that," First Am. Compl. ¶ 103, is a non-actionable statement of opinion. But the court need not even reach that issue.

As the court has already explained, Darbouze has produced no competent evidence that Ball ever said anything about his being from Haiti or that Ball ever said Darbouze thought he was "all that." All Darbouze offers is: (1) the inadmissible hearsay from his deposition and his discovery materials, neither of which mention comments by Ball about either his national origin or his opinion of himself; and (2) Ball's testimony that in August or September of 2007, he said something to Keeley about his inability to come to an agreement with Darbouze on a schedule. Because Darbouze has produced no evidence that Ball ever made the statement on which his defamation claims are based, defendants are entitled to judgment as a matter of law on Counts XIII and XIV.

Conclusion

For the reasons given, defendants' motion for summary judgment, document no. 17, is granted. The clerk of the court shall enter judgment in accordance with this order and close the case.

SO ORDERED.

Landya B. McCafferty
United States Magistrate Judge

December 16, 2011

cc: Seth J. Hipple, Esq.
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